RF DEVELOPMENT, LLC

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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: ET Docket No. 04-373 SafeView, Inc., Request for Waiver of Sections 15.31 and 15.35 of the Commission's Rules

On behalf of RF Development, LLC, pursuant to Section 1.1206(b)(1) of the Commission's Rules, I am electronically filing this written *ex parte* communication in reponse to SafeView, Inc.'s request for waiver of Sections 15.31 and 15.35 of the
Commission's Rules.

RF Development, LLC is an LMDS license holder which was granted the LMDS A Block licenses for BTA116, Dover, Delaware (WPOH611) and BTA398, Salisbury, Maryland (WPOH612) on July 24, 1998. As managing director of RF Development, LLC, I am asking the Federal Communications Commission to reject the waiver sought by SafeView, Inc. on the following grounds.

<u>Premature To Seek FCC Waiver Before Marketplace Resolution</u>

SafeView, Inc. has developed a commercial screening device which operates in the LMDS band. SafeView's decision to develop a commercial product which operates in LMDS bandwidth licensed to other parties was done with its full knowledge and understanding that geographic spectrum authorities for these frequencies were awarded to others in FCC sanctioned auctions. SafeView's attempt to gain access to the use of this spectrum through a regulatory ruling by the FCC, prior to a marketplace resolution, disregards the rights of LMDS license holders and needlessly squanders the legal and regulatory resources of the FCC.

SafeView, Inc. has never notified RF Development, LLC about its products nor have we been contacted to discuss the possible commercial use of our licensed spectrum for its scanning product. Had it done so, we would have readily agreed to discuss with them interference issues and compensation schemes for use of our spectrum. To our knowledge, SafeView, Inc. has not taken this route with any LMDS licensee. The company's behavior of first seeking a regulatory solution, rather than a market place solution, contradicts the spirit and objectives of the FCC's spectrum allocation policy. The FCC's own spectrum allocation guidance paper, published in 1997, shortly before RF Development's entry into the LMDS auction, summarized what we understood the FCC's guiding principals to be:

> "In general, the public derives the greatest benefit from spectrum to the extent that spectrum is used for services that the public values most highly and therefore is most willing to pay for. No government agency, however, can reliably predict public demand for specific services or the future direction of new technologies. Even if technology and the public's needs were unchanging, a central planner could only imprecisely evaluate the benefits of the myriad possible uses of spectrum and determine which frequencies should be used for each service. Given the rapid evolution of technology, moreover, the Commission cannot reliably predict what services will be available or which frequency range will be efficient for any service even a few years from now, much less what the public demand for each service will be and how to respond to changing demand. Therefore, even if the Commission could correctly identify the most economically efficient use of spectrum at any given time, it would be obliged continually to modify its allocations to reflect technological and economic developments. This reallocation process necessarily consumes substantial public and private resources, reduces certainty for users of spectrum, discourages investment, and delays the introduction of new services. This process also discourages innovation because it requires entrepreneurs to disclose their ideas to the public well in advance of their introduction, severely diminishing the competitive advantage from being first to market.
>
> In recognition of these shortcomings of central planning, we believe the Commission should, wherever possible, rely on market forces to ensure economically efficient use of spectrum. In a perfectly competitive market, firms will produce the combination of goods and services most desired by consumers in the most efficient manner, and will offer these goods and services at competitive prices. In this way, the market achieves technological and allocative efficiency. Furthermore, entrepreneurs have an incentive to enter, where feasible, into production of goods and services that have been provided on a less

> than fully competitive basis, since these products tend to offer the greatest opportunities for profits. Thus, if reasonably competitive conditions exist and significant
> market failures do not occur, the market achieves economically efficient use of resources more quickly and more reliably than government regulation.[1]"

Only after SafeView, Inc. has first attempted to enter into agreements with existing LMDS licensees for use of their spectrum should they be allowed to petition the FCC for secondary use of the spectrum. Any consideration by the FCC of SafeView's request prior to its good faith effort to work with the license holders is unfair, disregards our auction right to the exclusive use of the spectrum in our geographic area, precludes us from obtaining a potion of a return on our investment, encourages potential spectrum users to by-pass participating in future auctions, squanders FCC legal and regulatory resources, raises questions for future auctions about what rights the FCC is really offering for exclusive spectrum authorities and fails to allow the marketplace a chance to resolve SafeView's requirements.

<u>Public Safety Considerations</u>

SafeView Inc.'s development of an innovative security screening system appears to have important and desirable public safety benefits. SafeView's system, however, was developed with the full knowledge that it operated in spectrum licensed to other entities. The company could have participated in earlier LMDS auctions, but did not. The company could have selected other higher (or lower) bandwidths in which to develop a commercial product, but it did not. The company could have, but it did not, negotiate spectrum usage agreements with existing LMDS licensees prior to its waiver request.

SafeView, Inc. and the rights of existing LMDS licensees can both be served without any impact on public safety or any involvement by the FCC. In fact, public safety may be impacted due to the delay resulting from SafeView's decision to involve the FCC in a waiver request. Commercial deployment of SafeView's scanning devices would not be impeded if it had started where it should have a long time ago, with the licensees, rather than with a waiver request to the Commission.

Respectfully Submitted,

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[1] Federal Communications Commission Auction Reports, "Using Market-Based Spectrum Policy to Promote the Public Interest" Gregory L. Rosston and Jeffrey S. Steinberg, January 1997.

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